Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-48

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether respondent's convictions should be set aside because the government failed to disclose, in response to respondent's pretrial request, evidence that respondent might have used to impeach two government witnesses, when it has been established beyond a reasonable doubt that the evidence would not have affected the verdict.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 719 F.2d 1462. The order of the district court (Pet. App. 7a-9a) and the proposed findings and recommendations of the magistrate (Pet. App. 10a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1983 (Pet. App. 17a). A petition for rehearing was denied on March 2, 1984 (Pet. App. 16a). On May 22, 1984, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to July 10, 1984. The petition was filed on that date and granted on November 13, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Respondent was indicted in the United States District Court for the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes.[1] In December 1977, after a trial without a jury, he was convicted on 11 counts of narcotics violations and acquitted on the other charges.[2] O'Connor and Mitchell, two private security guards who were also commissioned as state law enforcement officers, had aided the Bureau of Alcohol, Tobacco and Firearms (ATF) in its investigation of respondent and testified for the government at respondent's trial. Pet. App. 2a.

[1] Count I of the indictment charged that respondent was an accessory after the fact to various firearms offenses, in violation of 18 U.S.C. 3. Counts II and III charged that respondent distributed controlled substances, and Counts VI-XIV charged that he possessed controlled substances with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B). Count IV charged him with dealing in firearms and ammunition without being licensed to do so, in violation of 18 U.S.C. 922(a)(1) and 924(a). Counts V and XV charged him with possessing unregistered firearms, in violation of 26 U.S.C. 5861(d) and 5871. E.R. 1-7. ("E.R." refers to the Excerpt of Record filed in the court of appeals.)

[2] Respondent was found not guilty on Counts I, IV, V, and XV. He was convicted on Counts II and III. On Counts VI-XIV, he was found guilty "of the lesser-included crime of possessing the described controlled substance" (E.R. 31). On Count II he was sentenced to six months' imprisonment and a special parole term of five years. On Count III he was sentenced to a suspended term of three years' imprisonment and placed on probation for five years. On Counts VI through XIV his sentence was suspended and he was placed on probation for five years. E.R. 32. Respondent's probation was subsequently revoked when he was convicted of another offense, and he was sentenced to three years' imprisonment. Pet. App. 10a; E.R. 119.

Before the trial, respondent sought discovery of numerous items (J.A. 17-19). One of his discovery requests was for the following (J.A. 18):

> The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, any deals, promises or inducements made to witnesses in exchange for their testimony.

Among the material delivered in response to the various discovery motions were affidavits by O'Connor and Mitchell. These affidavits, which were apparently furnished by the government in order to comply with respondent's request (J.A. 18) for "all Jencks Act material" (see 18 U.S.C. 3500), had been prepared during the investigation of respondent. They recounted at some length the dealings that O'Connor and Mitchell had with respondent on various occasions. See E.R. 64-85.[3] Each affidavit contained the following recital: "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." E.R. 65, 66, 70, 72, 74, 77, 79, 82, 84.[4]

[3] Copies of these affidavits are also appended to respondent's motion for collateral relief, a copy of which we have lodged with the Clerk of this Court.

[4] The court of appeals characterized these recitals as statements by O'Connor and Mitchell that each "had neither received nor expected compensation for his services" (Pet. App. 2a). This description is exaggerated and inaccurate. The recitals, both literally and in context, represent only that the witnesses were not paid for giving their statements, not that they expected no compensation for the activities described in the statements.

2. In 1980, respondent filed a motion to vacate his sentence under 28 U.S.C. 2255.[5] He alleged that the government had failed to disclose evidence that he could have used to impeach O'Connor and Mitchell. Respondent's motion was assigned to the same district judge who had presided over his non-jury trial and rendered the verdict.

After a hearing before a magistrate, the district court found (see Pet. App. 7a) that in May 1977, O'Connor and Mitchell had each signed a blank form contract printed by ATF (see J.A. 22-23). This form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor."[6] The district court found that these forms "reflected no description of services, no dollar amount, and no signatures on behalf of ATF. The Contracts were not signed on behalf of ATF until after the trial" (Pet. App. 7a). O'Connor testified at the hearing on respondent's motion that he "signed many ATF forms during the course of the investigation" (*ibid.*), and the district court found that "neither O'Connor nor Mitchell remembers signing [the contracts]. * * *

[5] Respondent originally filed a petition for a writ of habeas corpus (see 28 U.S.C. 2241) in the Central District of California, where he was confined. This filing was deemed a motion for relief under 28 U.S.C. 2255 and transferred to the Western District of Washington. See E.R. 120. Apparently because respondent first sought a writ of habeas corpus, the warden having custody of respondent was named as the appellee in the court of appeals. The United States is the proper party adverse to the movant in a Section 2255 proceeding, and we have substituted the United States as petitioner in this Court.

[6] Respondent sought collateral relief after he had discovered these contracts by invoking the Freedom of Information Act and the Privacy Act, 5 U.S.C. 552 and 552a (Pet. App. 2a).

There is no evidence that either O'Connor or Mitchell read the Contract or retained a copy" (*ibid.*).

The district court further found that no representative of the government "ever promised future payment for their testimony, either to O'Connor or to Mitchell, except for nominal witness fees" (Pet. App. 11a). The court noted that the ATF agent with whom O'Connor and Mitchell were dealing "might have told them, at the time they signed the Contracts, that he would attempt to secure some expense money for them" (*id.* at 12a). After the trial, this ATF agent initiated efforts to obtain compensation for O'Connor and Mitchell, and each received $300 (*id.* at 13a, 14a; see J.A. 24, 25). On this basis, the district court concluded that "it appears probable * * * that O'Connor and Mitchell did expect to receive from the United States some kind of compensation, over and above their expenses, for their assistance, though perhaps not for their testimony" (Pet. App. 7a).[7]

The form contracts were not disclosed to respondent before trial. The government attorney responsible for prosecuting respondent stated, in stipulated testimony, that he had not known of the unexecuted contracts and that he would have furnished them to respondent if he had known of them (Pet. App. 13a).

3. The district court denied respondent's motion. It remarked that "[a]s the trier of fact in [respondent's] trial * * * this Court is in the unique position of being able to know what effect the disclosure of

[7] O'Connor and Mitchell also were paid a small amount of expense money—$90 and $80 respectively—before trial. The district court found that these payments "were intended to reimburse them" (Pet. App. 14a) for "various expenses, including but not limited to automobile use and meals in the course of the investigation" (*id.* at 13a).

the ATF agreements with O'Connor and Mitchell would have had upon the decisions made by the Court in the criminal prosecution" (Pet. App. 8a). The district court then ruled "beyond reasonable doubt that had the existence of the agreements been disclosed to [the court] during trial that disclosure would have had no effect at all upon its finding that the government had proved beyond a reasonable doubt that defendant was guilty of the offenses" of which he was convicted (*ibid.*).

The district court explained the basis for its ruling as follows (Pet. App. 8a):

> The Court has read in their entirety the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial * * *. Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The Court found the defendant not guilty of those charges. With respect to the charges against defendant of distributing controlled substances and possessing controlled substances with the intention of distributing them, the testimony of O'Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies which had been prescribed for defendant's own use. As to that aspect of their testimony, the testimony of O'Connor and Mitchell tended to be favorable to the defendant.

4. The court of appeals reversed (Pet. App. 1a-6a). It stated (*id.* at 5a-6a): "[W]e hold that the government's failure to provide [the] requested * * * information to [respondent] so that he could effectively cross-examine two important government witnesses requires an automatic reversal."

The court of appeals stated that respondent "was unaware during trial that O'Connor and Mitchell were subject to impeachment for bias based on their remunerative relationship with the government. The government's failure to disclose this * * * information inhibited [respondent's] ability effectively to cross-examine two important prosecution witnesses." Pet. App. 4a. The court of appeals then emphasized the importance of cross-examination (*id.* at 4a-5a) and justified its "automatic reversal" rule by asserting that "a failure [by the government] to disclose requested * * * information that the defendant could use to conduct an effective cross-examination is [particularly] egregious because it threatens the defendant's right to confront adverse witnesses, and therefore, his right to a fair trial" (*id.* at 5a).

SUMMARY OF ARGUMENT

A. The court of appeals' ruling—that the government's failure to disclose certain evidence that might have been used to impeach government witnesses warrants an "automatic reversal"—is clear and obvious error. This Court has repeatedly emphasized that a failure by the government to disclose information that the defendant might have used at trial does not warrant setting aside a conviction unless the evidence had some effect on the outcome of the trial. For example, even if the government knowingly uses perjured testimony to convict a defendant, the defendant is entitled to relief only if there is a reasonable likelihood that the false testimony affected the verdict. Indeed, in *Giglio* v. *United States*, 405 U.S.

150 (1972), the government not only failed to disclose evidence of the kind the court of appeals believed was involved here—"evidence affecting [the] credibility" of an important government witness—but elicited false testimony at trial to the effect that that evidence did not exist; nevertheless, this Court, specifically rejecting the approach that has now been adopted by the court below, stated: "We do not, however, automatically require a new trial * * *. A finding of materiality of the evidence is required" (*id.* at 154). This Court has reiterated the materiality requirement on numerous occasions, and no other court of appeals has adopted a rule of "automatic reversal" in cases of this kind.

B. While it is entirely clear that the court of appeals should not have overturned respondent's conviction without some showing of materiality, this Court has not defined the showing that is necessary in cases in which the government fails to make a complete response to a defendant's specific request for information—the category in which the court of appeals placed this case. We submit that it is unnecessary in that class of cases for the government to satisfy the strict "beyond a reasonable doubt" standard that the district court found to have been satisfied here. This Court has held that a standard functionally equivalent to the reasonable doubt standard is applicable to cases in which the prosecution has knowingly used perjured testimony. Such cases, however, raise special concerns and pose a singular threat to the administration of justice; cases involving only a failure to disclose evidence that might possibly be helpful to the defense are markedly different, and the standard of materiality applicable to such cases should not be collapsed into the strict standard used in perjury cases.

We submit that the standard of materiality applicable to cases in which the prosecution does not give a complete response to a specific defense request for evidence should be chosen from two standards previously established by the Court for determining whether a defendant is entitled to a new trial: the standard specified in *United States* v. *Agurs*, 427 U.S. 97 (1976), for assessing the materiality of evidence that the prosecution fails to produce in response to a general defense request; and the standard—somewhat more favorable to the defendant—used for determining whether nonconstitutional error requires a new trial. See *Kotteakos* v. *United States*, 328 U.S. 750 (1946). At least in cases like the present case, in which the "specific request" is of a boilerplate variety and does not call to the prosecutor's attention anything unusual or special that he might ordinarily overlook in complying with his general disclosure obligations, there is much to be said for applying the same standard that is used in cases involving general requests; in either situation, that standard provides satisfactory assurances that the accused has enjoyed a fair opportunity to present his defense. In at least some circumstances, however, a failure to disclose evidence in response to a specific request may mislead defense counsel and thereby impede effective presentation of his case. It may therefore not be unreasonable to allow a new trial in specific request cases when the defendant makes the lesser showing needed to satisfy the *Kotteakos* standard.

ARGUMENT

RESPONDENT'S CONVICTIONS SHOULD NOT HAVE BEEN SET ASIDE ON THE GROUND THAT THE GOVERNMENT FAILED TO DISCLOSE REQUESTED INFORMATION

A. The Prosecutor's Failure To Disclose Information To The Defense Does Not Warrant Setting Aside A Conviction Unless The Evidence Is Material

1. The court of appeals explicitly ruled that a conviction must "automatic[ally]" be set aside if the government, in response to a discovery request like respondent's, fails to disclose information that might have been useful in impeaching a government witness.[8] This ruling appears simply to ignore the teach-

[8] Certain passages in the court of appeals' opinion might be read to hold that respondent's convictions must be set aside only because the district court erred in concluding that the nondisclosure of the ATF form contracts was harmless beyond a reasonable doubt. See Pet. App. 4a, quoting *United States* v. *Goldberg*, 582 F.2d 483, 488-489 (9th Cir. 1978); Pet. App. 5a ("Here, the district judge, who presided over the bench trial, concluded beyond a reasonable doubt that disclosure of the ATF agreement would not have affected [respondent's] conviction. We disagree."). As we explain in Part B of this brief, we believe it would also be error to require the government to show that a nondisclosure of the kind involved in this case is harmless beyond a reasonable doubt. Consequently, even if this Court interprets the court of appeals' decision simply as a ruling that the government failed to prove beyond a reasonable doubt that the ATF contracts would not have affected the outcome of respondent's trial, the Court should still reverse the court of appeals' decision, both because that standard was indisputably satisfied here and because it is in any event too generous to respondent.

But it is fairly clear that the court of appeals applied not a standard of harmless beyond a reasonable doubt but a "standard" of—as the court itself explicitly said—"automatic reversal" (Pet. App. 6a). The passages in the court of appeals' opinion that mention a reasonable doubt standard appear to refer to the test that, in the court of appeals' view, should generally apply to "the government's failure to provide requested [exculpatory] information" (*id.* at 5a). After announcing this standard, however, the court of appeals ruled that when "the defendant could use" the information that was not disclosed "to conduct an effective cross-examination," the government's failure "is even more egregious" and accordingly "requires an automatic reversal" (*id.* at 5a-6a). It is unclear why the court of appeals believed that a failure to disclose information useful only for impeachment is more egregious than a failure to disclose directly exculpatory information, since just the opposite would normally be true. But that appears to be the court's ruling.

Not only does the opinion on its face reflect a requirement of automatic reversal, but it would have been extraordinary for the court of appeals to overturn the district judge's ruling about the effect of the evidence in question on the verdict—which was rendered by the district judge himself. At the very least, if the court of appeals did intend to overturn the trial judge's determination on this issue, one would have expected the court of appeals to provide a more full explanation of why the trial judge erred. Its failure to do so is a further indication that it indeed applied a rule of "automatic reversal."

ings of this Court's decisions. In a criminal prosecution, the government has a duty, under certain circumstances, to disclose information in its possession that could be useful to the defense. *United States* v. *Agurs*, 427 U.S. 97 (1976); *Brady* v. *Maryland*, 373 U.S. 83 (1963). But few things are better settled than that the prosecution's failure to disclose information does not require a new trial unless the information was material—that is, unless there is a sufficient likelihood, measured against the standard appropriate for the circumstances, that the evidence would have affected the outcome of the trial.

For example, even if the government deliberately uses perjured testimony in its efforts to convict a defendant—a far more egregious impropriety than anything alleged here (see *Agurs*, 427 U.S. at 104; *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935))—the conviction is not automatically set aside; the defendant is entitled to relief only if there is some reasonable "likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103 (footnote omitted). See *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959). In *Giglio*, the government not only failed to disclose evidence of the precise kind that the court of appeals believed was involved here—"evidence affecting [the] credibility" of a crucial government witness (405 U.S. at 154)—but actually elicited from the witness false testimony denying the existence of that evidence. Nevertheless, this Court explicitly stated: "We do not * * * automatically require a new trial" (*ibid.*). Instead, the Court ruled, "[a] finding of materiality of the evidence is required" (*ibid.*). Here, the government did not elicit false testimony from any witness (see page 3 note 4, *supra*); it therefore follows *a fortiori* from *Giglio* that a new trial was not automatically required here.[9]

This Court has repeatedly stated the principle that an automatic reversal is not warranted, and that some showing of materiality is required, in cases in which defendants seek to have their convictions set aside because the government failed to disclose, or

[9] In addition, of course, far from being "crucial" prosecution evidence on the counts on which respondent was convicted, the testimony of O'Connor and Mitchell was of little importance, and the judge who rendered the verdict stated that this testimony tended to be exculpatory.

otherwise suppressed, evidence that might have been helpful to the defense. In *Agurs*, where the prosecution did not disclose information in its files that was arguably useful to the defense, the Court viewed as axiomatic the principle that a defendant cannot obtain relief unless he shows that the evidence is material; the Court discussed only the degree of materiality that is required in various situations. See 427 U.S. at 104-114. See also *Moore* v. *Illinois*, 408 U.S. 786, 794-798 (1972); *Brady*, 373 U.S. at 87 (emphasis added) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process *where the evidence is material either to guilt or to punishment.*").

Recently, in *United States* v. *Valenzuela-Bernal*, 458 U.S. 858 (1982), the Court canvassed its precedents establishing that in all the various areas related to the government's obligation to disclose evidence useful to the defense, the defendant is not entitled to relief unless the evidence is material. See *id.* at 867-872, citing, inter alia, *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978); *United States* v. *Lovasco*, 431 U.S. 783 (1977); *Barker* v. *Wingo*, 407 U.S. 514 (1972); *United States* v. *Marion*, 404 U.S. 307 (1971); *Washington* v. *Texas*, 388 U.S. 14 (1967); and *Roviaro* v. *United States*, 353 U.S. 53 (1957). And in discussing the government's duty to preserve evidence, this Court has referred to the "standard of constitutional materiality" discussed in *Agurs* and stated: "Whatever duty the Constitution imposes * * *, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *California* v. *Trombetta*, No. 83-305 (June 11, 1984), slip op. 9 (footnote omitted). See also *United States* v. *Augen-*

blick, 393 U.S. 348, 356 (1969); *Giles* v. *Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring). The refusal to allow retrial in the absence of some showing of materiality of the claimed omission or error rests on the entirely sound principle that the interests of society and of criminal defendants as a class are ordinarily not furthered, but rather impaired, by burdening the criminal justice system with the obligation of retrying cases when there is no sufficient basis for doubting the accuracy of the outcome of the first trial.

2. In attempting to justify its rule of "automatic reversal," the court of appeals relied almost exclusively on *Davis* v. *Alaska*, 415 U.S. 308 (1974). But *Davis* is not a departure from the principle that the government's failure to disclose evidence cannot warrant a new trial unless there is a sufficient likelihood that the evidence would have affected the outcome of the initial trial. The Court in *Davis*, relying on the Confrontation Clause of the Sixth Amendment, overturned a conviction because the defendant was prohibited from using in his cross-examination of Green, a crucial witness against him, the fact that Green was on probation as a juvenile delinquent. The Court summarized the significance of this evidence (*id.* at 311):

> [Defense] counsel made it clear that he would not introduce Green's juvenile adjudication as a general impeachment of Green's character as a truthful person but, rather, to show specifically that at the same time Green was assisting the police in identifying [the defendant] he was on probation for burglary. From this [the defendant] would seek to show—or at least argue—that Green acted out of fear or concern of possible jeopardy to his probation. Not only might

> Green have made a hasty and faulty identification of [the defendant] to shift suspicion away from himself * * *, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation.

Elsewhere in the opinion in *Davis*, the Court described the evidence in a way that shows that the Court found the prohibition on its use highly damaging to the defense. See *id.* at 313-314, 318; *id.* at 319 ("Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry.").

On this basis, the Court in *Davis* concluded that defense counsel had to be able to "expose [Green's status] to the jury" in order "to make [his cross-examination] effective" (415 U.S. at 318). Because Green was a crucial witness, and the protective order prevented effective cross-examination, the Court equated *Davis* to *Brookhart* v. *Janis*, 384 U.S. 1 (1966), in which a defendant was denied the right to cross-examine witnesses at all, and to *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968), in which "the right of cross-examination" was "effectively * * * emasculate[d]" because the defendant was prohibited from making a "rudimentary inquiry at the threshold" into the name and address of the crucial witness against him. See *Davis*, 415 U.S. at 318.

The most prominent difference between *Davis* and this case is that *Davis* involved a direct restriction on the scope of cross-examination. Here, the district court did not limit the cross-examination of O'Connor and Mitchell in any way; respondent was free to inquire into their relationship with the government as vigorously as he wished. It is therefore at least ar-

guable that this case, unlike *Davis*, does not implicate the Confrontation Clause at all.

Assuming arguendo that *Davis* is relevant to the issue raised by this case, *Davis* can be said to stand at most for the proposition that when a defendant is denied the right effectively to cross-examine a crucial government witness, his conviction must be reversed. See *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 11. A requirement of materiality is obviously inherent in this principle: a conviction is to be set aside not if the cross-examination of any witness—or even a crucial witness—is in some way impaired [10] but only if the cross-examination of a key witness is inhibited to the point that it is rendered ineffective.[11] The district court in this case ruled that

[10] Indeed, the passage we quoted from *Davis* (pages 14-15, *supra*, quoting 415 U.S. at 311) suggests that the state court would not have erred if it had merely forbidden the use of Green's juvenile record "as a general impeachment of Green's character as a truthful person."

[11] See also *United States* v. *Abel*, No. 83-935 (Dec. 10, 1984), slip op. 4-5 (*Davis* requires only that a defendant "have some opportunity to show bias on the part of a prosecution witness"). The courts of appeals, in applying *Davis* to cases in which defendants challenged restrictions on cross-examination, have consistenly considered the materiality of the restrictions. In particular, the courts of appeals have denied relief where a defendant failed to show that the restrictions imposed on his right to cross-examine a government witness substantially interfered with cross-examination. See, *e.g.*, *United States* v. *De Gudino*, 722 F.2d 1351, 1354-1355 (7th Cir. 1983); *United States* v. *Arruda*, 715 F.2d 671, 680 (1st Cir. 1983); *United States* v. *Balliviero*, 708 F.2d 934, 938-940 (5th Cir. 1983); *United States* v. *Ong*, 541 F.2d 331, 341-342 (2d Cir. 1976); *United States* v. *Haimowitz*, 706 F.2d 1549, 1558-1559 (11th Cir. 1983); *United States* v. *Harley*, 682 F.2d 1018, 1021 (D.C. Cir. 1982). Indeed, even where substantial restrictions on cross-examination were erroneously imposed, several courts of appeals have denied relief if,

neither O'Connor nor Mitchell was a crucial witness against respondent in connection with the charges on which he was convicted, and that the nondisclosure of the ATF form contracts did not impair respondent's cross-examination of O'Connor and Mitchell to the extent that it could possibly be said that respondent was denied the right to effective cross-examination. Pet. App. 8a. The court of appeals did not explicitly disagree with either of these rulings or explain why either was wrong. Accordingly, *Davis* does not support the court of appeals' decision.

3. As we explain below, the courts of appeals disagree over the standard of materiality that should be applied in cases of this kind. See pages 23-24 note 16, *infra*. But there is no disagreement that some standard of materiality must be applied. We know of no other court of appeals that has adopted a rule of "automatic reversal" for the prosecution's failure to disclose information that would tend to impeach a government witness or for any other nondisclosure of information by the government.[12]

considering the evidence as a whole, the error was harmless. See, *e.g.*, *Carrillo* v. *Perkins*, 723 F.2d 1165, 1170-1172 & n.7 (5th Cir. 1984) (citing cases); *United States* v. *Whitt*, 718 F.2d 1494, 1501-1502 (10th Cir. 1983); *United States ex rel. Scarpelli* v. *George*, 687 F.2d 1012, 1013-1014 (7th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); *United States* v. *Gambler*, 662 F.2d 834, 840-842 (D.C. Cir. 1981); *Snyder* v. *Coiner*, 510 F.2d 224, 228 (4th Cir. 1975). In other cases, the courts of appeals have found certain restrictions on the right to cross-examination to be unconstitutional under *Davis*, but only after discussing the materiality of the restrictions. See, *e.g.*, *Chavis* v. *North Carolina*, 637 F.2d 213, 225-226 (4th Cir. 1980).

[12] There are numerous court of appeals cases in which the prosecution failed to disclose information useful for impeachment purposes in response to a specific request but the conviction was upheld because the evidence was not sufficiently

B. The Government Was Not Required To Demonstrate Beyond A Reasonable Doubt That The Undisclosed Evidence Would Not Have Affected The Verdict In Respondent's Trial

For the reasons we have stated, it is entirely clear that the court of appeals should have required some showing of materiality before setting aside respondent's convictions. It is not immediately clear, however, how material the undisclosed evidence had to be in order to justify such a result. This Court's previous decisions have not specified the standard of materiality that should be applied to a case in which the prosecution has failed to disclose evidence specifically requested by the defense—the category in which the court of appeals placed the case. See pages 21-22 and note 15, *infra*. Moreover, the courts of appeals have adopted differing approaches to cases of this kind. See pages 23-24 note 16, *infra*.

The district court stated that it was convinced beyond a reasonable doubt that the use of the ATF form contracts to impeach O'Connor and Mitchell would not have affected the outcome of respondent's trial. This "beyond a reasonable doubt" standard is

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material. See, *e.g.*, *United States* v. *Farid*, 733 F.2d 1318, 1320-1321 (8th Cir. 1984); *United States* v. *Sperling*, 726 F.2d 69, 72-73 (2d Cir. 1984); *Ruiz* v. *Cady*, 710 F.2d 1214 (7th Cir. 1983); *United States* v. *Truong Dinh Hung*, 667 F.2d 1105, 1107 (4th Cir. 1981), cert. denied, 454 U.S. 1144 (1982); *Zeigler* v. *Callahan*, 659 F.2d 254, 266-267 (1st Cir. 1981); *United States ex rel. Marzeno* v. *Gengler*, 574 F.2d 730 (3d Cir. 1978); *Calley* v. *Callaway*, 519 F.2d 184, 222 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976) ("[W]hen *Brady* is invoked to obtain information not favorable on the issue of guilt or innocence but useful for attacking the credibility of a prosecution witness, the information withheld must have a definite impact on the credibility of an important prosecution witness in order for the nondisclosure to require reversal.").

the strictest test of materiality, although still considerably short of requiring that a conviction be automatically set aside. While it was useful for the district court to note that this strict standard was met, we submit that the court need not have applied such a strict standard. For reasons we will explain below, we believe that the strictest materiality standard that can justifiably be applied to a case of this kind would be one comparable to the harmless error test used to determine whether a federal nonconstitutional error requires that a conviction be set aside. See *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946).

1. The opinion in *Agurs* contains this Court's most detailed discussion of the standards of materiality that are to be applied when the government fails to disclose exculpatory information to the defense. *Agurs* identified "three quite different situations * * * involv[ing] the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." 427 U.S. at 103.

a. In the first situation, "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." 427 U.S. at 103 (footnote omitted). Cases in this category include, for example, *Miller* v. *Pate*, 386 U.S. 1 (1967), in which the State had its witness testify that an article of clothing was stained with the victim's blood even though the prosecutor knew that the stain was paint.

In this category of cases, "the Court has applied a strict standard of materiality" (*Agurs*, 427 U.S. at 104). Specifically, the Court has ruled that the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected

the judgment of the jury." *Id.* at 103 (footnote omitted). This standard—which is essentially indistinguishable from the standard of "harmless beyond a reasonable doubt" that is used for determining whether a federal constitutional error requires reversal of a conviction (see *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972); *Chapman* v. *California*, 386 U.S. 18, 23 (1967), citing *Fahy* v. *Connecticut*, 375 U.S. 85 (1963))—was applied by the district court in this case.

b. The second situation "is characterized by a pretrial request for specific evidence." 427 U.S. at 104. The Court in *Agurs* gave *Brady* v. *Maryland*, *supra*, as an example of a case in this category. In *Brady*, the defendant, charged with murder, requested the extrajudicial statements of his accomplice. The prosecution disclosed several such statements but did not disclose a statement in which the accomplice admitted that he, not the defendant, actually killed the decedent. This Court ruled that the suppression of the accomplice's confession violated due process.[13] See 427 U.S. at 104-106; 373 U.S. at 86-88. The court below appears to have concluded that the present case falls within this second category. We believe that conclusion is difficult to support,[14] but we will assume arguendo that it is correct.

[13] After ascertaining that under state law the confession would have been admissible in proceedings to determine the defendant's punishment but inadmissible on guilt or innocence, the Court ordered a new trial on the issue of punishment alone. 373 U.S. at 88-91.

[14] To begin with, it is questionable whether respondent's discovery request was comparable in specificity to that of the defendant in *Brady*. See, *e.g.*, *Zeigler* v. *Callahan*, 659 F.2d 254, 267 n.6 (1st Cir. 1981); *United States* v. *Goldberg*, 582 F.2d 483, 489 (9th Cir. 1978), cert. denied, 440 U.S. 973 (1979). But more important, it cannot really be said that the government failed to comply with respondent's discovery request. Indeed, the district court appears to have avoided a square ruling on whether the government should have disclosed additional information; it apparently preferred to rest its holding on the conclusion that respondent was not prejudiced even if the prosecution did err.

Respondent requested information concerning "any deals, promises or inducements made * * * in exchange for the[] testimony" of O'Connor and Mitchell (J.A. 18). The district court found that O'Connor and Mitchell were never promised payment by the government for their testimony (Pet. App. 7a, 11a), and the court of appeals did not set aside this finding—as indeed it had no basis to do. The form contracts were not filled out and were not signed by ATF until after the trial. Thus, at the time of respondent's discovery motion, the contracts did not show that the witnesses had been promised any money at all—much less compensation (as opposed to expense money) for their testimony (as opposed to their undercover law enforcement activity).

The district court found only that it was "probable" that O'Connor and Mitchell "did expect to receive * * * some kind of compensation" (Pet. App. 7a). Such a purely subjective and unilateral expectation, of course, did not have to be "disclosed" in response to respondent's pretrial request. Moreover, the district court stated that O'Connor and Mitchell expected compensation "for their assistance, though perhaps *not* for their testimony" (*ibid.*; emphasis added). Respondent's pretrial request referred only to consideration promised in exchange for testimony.

The district court attached no significance to the fact that O'Connor and Mitchell received a small amount of expense money before trial (see page 5 note 7, *supra*). It is unclear whether the court of appeals believed that the government should have disclosed this information. In any event, the reimbursement of expenses was not within respondent's discovery request.

The Court in *Agurs* did not define the standard of materiality that is to apply when the prosecution fails

the judgment of the jury." *Id.* at 103 (footnote omitted). This standard—which is essentially indistinguishable from the standard of "harmless beyond a reasonable doubt" that is used for determining whether a federal constitutional error requires reversal of a conviction (see *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972); *Chapman* v. *California*, 386 U.S. 18, 23 (1967), citing *Fahy* v. *Connecticut*, 375 U.S. 85 (1963))—was applied by the district court in this case.

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The Court in *Agurs* did not define the standard of materiality that is to apply when the prosecution fails

to disclose evidence that is within a specific discovery request filed by the defense. To be sure, the Court in *Agurs* did remark that a "fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial" (427 U.S. at 104), and some court of appeals decisions have viewed this as the standard of materiality to be applied in "specific request" cases. See pages 23-24 note 16, *infra*. But in our view this Court plainly did not intend the phrase "might have affected the outcome of the trial" to function as a standard or test at all, because that language provides no guidance on the crucial issue—how likely a judge must find it to be that the evidence would have affected the outcome of the initial trial before he orders a new trial.[15] In practice, the courts of appeals have applied differing standards for evaluating the materiality of

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[15] The Court in *Agurs* recognized the imprecision of the phrase "might have affected the outcome of the trial" when it rejected, for cases like *Agurs* itself, a standard that depended on whether the undisputed evidence "might" have affected the jury. See 427 U.S. at 109.

In our view, when the Court said that "materiality" involves "a concern that the suppressed evidence might have affected the outcome of the trial" it was merely providing a definition of materiality: evidence cannot be said to be "material" at all, under any test, unless it might have affected the outcome of the trial. The Court provided this definition, we believe, because *Brady* used the term "material" without explaining what it meant. See 373 U.S. at 87. The Court in *Agurs* wished to make it clear that materiality in the sense of affecting the outcome of the trial—and not prosecutorial misconduct—was at the core of the holding in *Brady*. See *Agurs*, 427 U.S. at 104 & n.10.

information that is not disclosed in response to a specific defense request.[16]

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[16] See, *e.g.*, *United States* v. *Flaherty*, 668 F.2d 566, 588 (1st Cir. 1981) (conviction not set aside because undisclosed evidence "had comparatively little significance, and we cannot say [that it] might have affected the outcome of the trial"); *United States* v. *DiCarlo*, 575 F.2d 952, 958, 959 & n.5 (1st Cir.), cert. denied, 439 U.S. 834 (1978) (standard of "demonstrably harmless error" applies in second *Agurs* category); *United States* v. *Sperling*, 726 F.2d 69, 72 (2d Cir. 1984) (equating materiality standard applied to first and second *Agurs* categories, but also intimating that "no reasonable likelihood" standard applies in second category only if the evidence was deliberately withheld by the government); *Chavis* v. *North Carolina*, 637 F.2d 213, 224, 225 n.16 (4th Cir. 1980) (convictions set aside because court found "no[] doubt that [the undisclosed evidence] * * * might have had a substantial impact on the outcome of the case"; stating that standard in "specific request" cases is stricter than in third *Agurs* category but intimating that it may be less strict than standard for knowing use of perjured testimony); *Monroe* v. *Blackburn*, 607 F.2d 148, 151 & n.5 (5th Cir. 1979) (when government does not make a response to a specific request, conviction will be set aside unless there is "no reasonable likelihood" that the evidence would have affected the outcome of the trial; this is "very similar" to test applied when prosecution knowingly uses perjured testimony); *Jones* v. *Jago*, 575 F.2d 1164, 1168-1169 (6th Cir.), cert. denied, 439 U.S. 843 (1978) ("We conceive under *Agurs* that the threshold of materiality is relatively low where a specific request is involved."); *United States* v. *Weidman*, 572 F.2d 1199, 1204-1205 (7th Cir. 1978) (this Court in *Agurs* "did not define the precise standard of materiality to be applied" to cases involving a specific request; no new trial ordered because undisclosed information "cannot be viewed as 'material' in any meaningful sense of the word"); *United States* v. *Farid*, 733 F.2d 1318, 1320-1321 (8th Cir. 1984) (suggesting that standards for second and *third Agurs* categories are the same; upholding district court's "determin[ation] that the undisclosed material would not have made a difference"); *United States* v. *Gold-*

c. The third situation identified in *Agurs* occurs when the defendant has made either no request or "merely a general request for exculpatory matter" (427 U.S. at 107). In such a situation, a convicted defendant is entitled to a new trial only if there was evidence in the prosecution's files that, when "evaluated in the context of the entire record," creates "a reasonable doubt that did not otherwise exist" about the defendant's guilt (*id.* at 112).

Strickland v. *Washington*, No. 82-1554 (May 14, 1984), sheds further light on the test *Agurs* establishes for this category of "general request" cases. The Court ruled in *Strickland* that a similar test applies when a defendant attempts to obtain a new trial on the ground that, owing to the incompetence of counsel, certain evidence was not introduced at his first trial. See slip op. 24-25. The Court explained that, in order to satisfy this test, "[t]he defendant

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berg, 582 F.2d 483, 488-489 & n.7 (9th Cir. 1978), cert. denied, 440 U.S. 973 (1979) (standard is "whether the requested evidence might affect the outcome of the trial," which is "synonymous with the harmless error standard," citing both Fed. R. Crim. P. 52(a) and *Chapman* v. *California*, 386 U.S. 18, 24 (1967), without distinguishing between them; also asserting that there is a "readily applicable distinction" between the materiality standard applied in "specific request" cases and the standard applied to the knowing use of perjured testimony); *United States* v. *Warhop*, 732 F.2d 775, 778 (10th Cir. 1984) (standard is whether there is "a reasonable possibility" that the evidence might have affected the outcome of the trial; citing both *Chavis* v. *North Carolina*, *supra*, and *United States* v. *Goldberg*, *supra*); *United States* v. *Montoya*, 716 F.2d 1340, 1346 (10th Cir. 1983), quoting *United States* v. *Prout*, 526 F.2d 380, 389 (5th Cir.), cert. denied, 429 U.S. 840 (1976) ("[T]o be material, impeachment evidence suppressed must at least affect a 'witness whose testimony is crucial to the government's case.'").

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Slip op. 24. Since the Court apparently intended the *Strickland* standard closely to resemble the standard specified in *Agurs* for "general request" cases, the *Strickland* formulation of this standard can be viewed as an accurate account of the meaning of the *Agurs* "general request" standard as well.

2. A strong argument can be made that the standard of materiality specified in *Strickland* and for the third category of cases considered in *Agurs* should be applicable to "specific request" cases as well. While we do not believe that this conclusion is necessarily compelled, we outline the argument in support of it because it helps demonstrate the inappropriateness of applying a "beyond a reasonable doubt" standard when the prosecution fails to respond fully to a specific request.

a. The materiality standard that should apply to a "specific request" case must be designed to protect the constitutional interests that are threatened when the prosecution does not disclose information in response to a specific request. The most important interest is obvious: it is to ensure that the accused has a fair chance to present evidence that tends to show his innocence. As Justice Marshall explained in *Agurs* (427 U.S. at 116; dissenting opinion):

> Our overriding concern in cases such as the one before us is the defendant's right to a fair trial. One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tend-

ing to show guilt, be fully aired before the jury * * *.

But this interest is fully protected by the standard of materiality applicable to cases in the third category described in *Agurs* and to claims of ineffective assistance of counsel. This is because the interest in having "evidence tending to show innocence * * * fully aired" is equally impaired irrespective of the reason that the evidence was not aired: it does not matter whether the evidence is not revealed because the defense does not request it of the prosecution (or makes only a general request); because the prosecution does not respond to a specific request; or because the prosecution does not possess the evidence and defense counsel incompetently fails to discover it. In each instance the evidence is omitted, and the resulting threat to the reliability of the trial process is equally great.[17]

The Court has determined that the materiality standard adopted in *Agurs* for "general request" cases and further elucidated in *Strickland* is sufficient to protect the interest in a fair and reliable trial process in those contexts. It follows that the same standard, if applied in "specific request" cases, should be sufficient to ensure that "the proper func-

[17] Indeed, the threat is also equally great when it is the fault of neither the prosecution nor defense counsel that the evidence did not come to light. In such a case, the defendant must seek relief under Fed. R. Crim. P. 33 and must "satisfy the severe burden of demonstrating that [the] newly discovered evidence probably would have resulted in an acquittal" (*Agurs*, 427 U.S. at 111; footnote omitted). The Court explained, in both *Agurs* and *Strickland*, the interests that led it to adopt in those cases a standard of materiality that is less favorable to the government. See *Agurs*, 427 U.S. at 111; *Strickland*, slip op. 23-24.

tioning of the adversarial process" is not "so undermined * * * that the trial cannot be relied on as having produced a just result" (*Strickland*, slip op. 16).

b. Consequently, a more strict standard of materiality should apply to "specific request" cases only if additional interests are implicated in such cases that are not affected when a prosecutor receives only a general request. It is not immediately apparent, however, what those interests are. Some courts of appeals have justified their imposition of a stricter standard of materiality in "specific request" cases by relying on this Court's discussion in *Agurs* of "the function of the request" (427 U.S. at 106).[18] The Court stated that a specific request gives the prosecutor "notice of exactly what the defense desire[s]." *Ibid.* Consequently, the Court reasoned, "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Ibid.* By contrast, a general request alerts the prosecutor only to his obligation to disclose "obviously exculpatory" material that he would have been obligated to disclose even in the absence of a request. *Id.* at 106-107.

We question whether the Court intended this discussion of the difference between general request and specific request cases to serve as the basis for applying different standards of materiality. To begin with, this discussion concerns "the pretrial decision of the prosecutor" whether to disclose evidence; the Court

[18] See, *e.g.*, *United States* v. *Oxman*, 740 F.2d 1298, 1306-1319 (3d Cir. 1984), petition for cert. pending *sub nom. United States* v. *Pflaumer*, No. 84-1033 (filed Dec. 27, 1984), discussed at page 35 note 22, *infra*; *United States* v. *Imbruglia*, 617 F.2d 1, 4-5 (1st Cir. 1980); *United States* v. *Goldberg*, 582 F.2d 483, 488 (9th Cir. 1978), cert. denied, 440 U.S. 973 (1979).

in *Agurs* carefully pointed out that there is "a significant practical difference" between this decision and "the post-trial decision of the judge" (427 U.S. at 108). The issue in this case is the standard of materiality that applies to the latter.

Moreover, this Court's discussion necessitates a very rigorous definition of what constitutes a "specific" request—a definition that would clearly exclude respondent's request in this case. See generally *Brown* v. *Chaney*, No. 84-169 (Dec. 10, 1984), slip op. 7 (Burger, C.J., dissenting from the denial of certiorari). When defense counsel requests certain evidence because he is seeking support for a theory of the defense that is not predictable or obvious, the request may indeed alert the prosecution to the defendant's interest in a particular category of information in its files. But more often—as in this case—a defendant's discovery requests will be routine, almost boilerplate demands for material that almost every defendant will want to receive; they will in fact give the prosecutor no more notice of what the defense seeks than he would have had if he had received a general request for all helpful material. A prosecutor will know, whether or not he receives a request, that the defendant is likely to be interested in receiving material that might be used to impeach government witnesses; and he will know that "any deals, promises or inducements made" to such witnesses "in exchange for their testimony" (J.A. 18) fall into that category. Thus, in this case and in other cases in which the defense makes a routine request for broad categories of information, the prosecutor's receipt of the request does not necessarily make his failure to disclose certain material any less excusable than it would have been in the absence of a request.

In addition, while we agree that it is not good practice for a prosecutor deliberately to withhold a document that contains material information, falls within a defense request, and has been specifically brought to his attention, that is not what happened here. As the district court found, the prosecutor in this case did not know of the ATF form contracts and would have disclosed them if he had. More important, it would be misleading to regard deliberate, considered concealment as the typical example of a government failure to disclose specifically requested information. A criminal investigation can involve numerous law enforcement agents associated with several diverse agencies. Moreover, a defendant or a witness might have had previous unrelated (or only indirectly related) encounters with law enforcement agencies. In such instances, documents that are arguably evidence of, for example, "deals, inducements, and promises" between the government and a witness can be scattered among numerous files in many different government agencies. A single prosecutor, no matter how relentless in attempting to fulfill a defense request for evidence, may have difficulty uncovering all the documents that fall within it. A failure to disclose evidence in response to a specific request is, therefore, often the result of nothing more "inexcusable" than the unavoidable difficulties of operating a large bureaucracy.[19] Under *Agurs*, the post-trial discovery

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[19] In this case, the documents in issue were apparently not in the files of the United States Attorney's office (compare *Giglio* v. *United States*, *supra*) but in the possession of law enforcement agencies involved in the investigation. In our view, a defense request for information should not ordinarily be construed as applying to unspecified law enforcement agencies that were not involved in the investigation—and should

of the evidence in such cases entitles a defendant to a relief if it raises a reasonable doubt about his guilt; but the fact that such cases involve a specific request is little reason to apply a more strict standard of materiality.

Finally, even to the extent that the failure to respond to a specific request *is* less excusable than the failure to respond to a general request or to no request, it does not follow that the standard of materiality should be stricter in a case involving a specific request. As the Court emphasized in *Agurs*, the fact that a prosecutor's actions may have been inexcusable does not mean that it should be easier for the defendant to obtain a new trial:

> Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. * * * If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

427 U.S. at 110; footnote omitted. As the Court said in *Brady*, a case that *Agurs* characterized as involving a specific request for information: "'[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of*

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certainly not be interpreted as applying to other government agencies that do not regularly engage in the investigation of criminal offenses. See generally *United States* v. *Beasley*, 576 F.2d 626, 630-631 (5th Cir. 1978); *United States* v. *Weidman*, 572 F.2d 1199, 1205-1207 (7th Cir. 1978); *United States* v. *Haldeman*, 559 F.2d 31, 73-74 (D.C. Cir. 1976) (en banc), cert. denied, 431 U.S. 933 (1977); *United States* v. *Dansker*, 537 F.2d 40, 61 (3d Cir. 1976).

the prosecution. The principle * * * is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.'" *Agurs*, 427 U.S. at 110 n.17, quoting and adding emphasis to *Brady*, 373 U.S. at 87. See also *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 14 n.31.

c. Notwithstanding the strength of the argument that cases involving a specific request should be subject only to the "reasonable probability" standard of *Strickland* and the general request cases, we acknowledge that a materiality standard more favorable to the defendant might reasonably be adopted in specific request cases. An incomplete response to a specific request not only deprives the defendant of certain evidence but has the effect of representing to the defendant that that evidence does not exist. The defendant may, as a result, abandon certain defenses or certain lines of inquiry that he would otherwise have pursued. It may then be difficult for a defendant, in post-trial proceedings, to reconstruct the course that his defense and the trial would have taken and to demonstrate that he would have created a reasonable doubt about his guilt. This can happen even if, as in this case, the incomplete response is given in complete good faith and without any intention of misleading the defense. In view of the possible unfairness of prosecutorial actions that have the effect—even if unintended—of misleading the defense, and of the need to encourage prosecutors to take steps to avoid such possible unfairness, a somewhat stricter standard of materiality may be deemed appropriate in "specific request" cases.

Here again, however, it is important not to overstate the differences between a situation in which there has been a specific request and one in which there has been no request or only a general request.

A defendant may be unaware of—and therefore unable to request—evidence in the prosecution's files that would cause him to pursue a different approach to the case. In attempting to demonstrate the materiality of that evidence under the standard applicable to the third *Agurs* category, the defendant will be faced with similar difficulties of reconstructing the course that his strategy and the trial would have followed. Similarly, a defendant whose trial counsel has made incompetent decisions must prove prejudice in order to obtain relief under *Strickland*, and in doing so he will face the difficult task of reconstructing the course that his defense would have followed if he had had competent counsel. See generally *Engle* v. *Isaac*, 456 U.S. 107, 133-134 (1982). Accordingly, although there are some differences between "specific request" and "general request" cases, the similarities between those two categories are sufficiently great to make a "beyond a reasonable doubt" standard of materiality—the strictest standard—clearly inappropriate in "specific request" cases.

3. The reasonable doubt standard would be inappropriate in "specific request" cases for two additional reasons. First, "harmless beyond a reasonable doubt" is the standard applied when a constitutional error has been committed; the nondisclosure of requested information is not in itself constitutional error. Second, a failure to respond fully to a discovery request does not implicate the vital interests that are threatened when the prosecution knowingly uses perjured testimony. The strict "beyond a reasonable doubt" standard applicable to the first category of cases identified in *Agurs* therefore has no place in this case.

a. The Constitution contains no clause requiring the prosecution to disclose exculpatory information

in its files—either on its own motion or in response to a request. Cf. *United States* v. *Augenblick*, 393 U.S. 348, 356 (1969).[20] The constitutional requirement of disclosure is derived entirely from the Due Process Clause. See *Agurs*, 427 U.S. at 102, 107; *Brady*, 373 U.S. at 87. And the Due Process Clause does not somehow contain a latent set of discovery rules; it requires certain kinds of pretrial disclosure not as an end in itself, but only as a means to the end of securing a fair trial. "The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry* v. *Johnson*, No. 83-328 (June 11, 1984), slip op. 6 (footnote omitted).

It follows that a prosecutor's failure to disclose information does not violate the Constitution unless it results in a denial of the fundamental fairness that the Due Process Clause requires. See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (1974) ("When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's [actions] * * * so infected the trial with unfairness as to make the resulting conviction a denial of due process."). As the Court emphasized in *Agurs*, "unless the [failure to disclose information] deprive[s] the defendant of a fair trial, there [is] no constitutional violation requiring that the verdict be

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[20] We do not understand the court of appeals to have relied on any nonconstitutional sources of authority, such as the supervisory power or Fed. R. Crim. P. 16, in setting aside respondent's convictions. Nor do we believe such free-form use of the supervisory power would be proper. See, *e.g.*, *United States* v. *Payner*, 447 U.S. 727 (1980).

set aside; and absent a constitutional violation, there [is] no breach of the prosecutor's constitutional duty to disclose. * * * [T]o reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 427 U.S. at 108.[21] And of course the prosecution's failure to disclose an item of requested information does not necessarily make a trial unfair. "[T]here can be no such thing as an error-free, perfect trial, and * * * the Constitution does not guarantee such a trial." *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983). The nondisclosure of requested information, therefore, is not ipso facto constitutional error and accordingly should not trigger the application of the constitutional harmless error rule. Cf. *Agurs*, 427 U.S. at 111-112. It should give rise only to an inquiry into whether the trial, taken as a whole, was nonetheless fair.

This Court has, in the exercise of its supervisory powers, sometimes imposed duties on the federal government to respond to requests for information from criminal defendants in certain strictly limited circumstances. See, *e.g.*, *Jencks* v. *United States*, 353 U.S. 657 (1977); *Gordon* v. *United States*, 344 U.S. 414 (1953). Congress has imposed a somewhat similar statutory duty. 18 U.S.C. 3500. It has never been suggested that these duties are constitutionally mandated (see, *e.g.*, *Augenblick*, 393 U.S. at 356; *Palermo* v. *United States*, 360 U.S. 343, 345 (1959)),

[21] While the Court made these remarks in *Agurs* in connection with "general request" cases, the source of any constitutional duty to disclose information remains the Due Process Clause, irrespective of whether the request is general or specific, and the same analysis applies.

and if the government violated these duties it would not have to demonstrate that the error was harmless beyond a reasonable doubt. See, *e.g.*, *Rosenberg* v. *United States*, 360 U.S. 367, 371 (1959); *id.* at 377 (Brennan, J., dissenting) (citing *Kotteakos* v. *United States*, *supra*). By contrast, neither the Court nor Congress has explicitly imposed on federal prosecutors a general duty to respond to all discovery requests for material information. See *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977). It follows *a fortiori* that the failure to make such responses should not be subjected to a standard that requires proof of harmlessness beyond a reasonable doubt.[22]

[22] In *United States* v. *Oxman*, 740 F.2d 1298, 1306-1319 (3d Cir. 1984), petition for cert. pending *sub nom. United States* v. *Pflaumer*, No. 84-1033 (filed Dec. 27, 1984), the court of appeals ruled that the government violates the Constitution whenever it fails to deliver requested evidence to the defense, so long as the defendant has a substantial basis for claiming that the evidence is material. The court further ruled that such a "violation" requires the reversal of the defendant's conviction unless it is harmless beyond a reasonable doubt. As we explain in our petition in *Pflaumer*, this holding is erroneous in several respects. First, it misinterprets the Due Process Clause by viewing it as prescribing rules to govern prosecutors' conduct; in fact, under the decisions of this Court discussed in text, the Due Process Clause is concerned not with the prosecutor's actions but with the fairness of the resulting trial. Second, as we demonstrated above (pages 10-17, *supra*), a defendant, in order to gain relief on the ground that the government failed to disclose or preserve evidence, must demonstrate that the evidence was in fact material, in the context of the actual trial; there is no warrant for lowering the threshold, as the court of appeals in *Pflaumer* did, to a "substantial basis" for "claiming" materiality. Cf. *Cuyler* v. *Sullivan*, 446 U.S. 335, 348-350 (1980). Third, as we explain in text, the "beyond a reasonable doubt" standard is appropriate for cases involving constitutional

b. The knowing use of perjured testimony threatens extremely important interests; a materiality standard equivalent to the constitutional harmless error rule is an appropriate means of protecting those interests. But a prosecutor's failure to comply with a specific discovery request is in no way comparable to the knowing use of perjured testimony, and the standard for assessing the latter should not be collapsed into the standard for remedying the former.

There is a fundamental difference between refusing to disclose information to the defense and presenting false evidence to the judge and jury. It is well settled that the adversary system permits the government to withhold evidence to some degree. See, *e.g.*, *Weatherford*, 429 U.S. at 559-561. Some elements of secrecy and surprise are necessarily part of the adversary system, and they are not necessarily undesirable. But it is an equally fundamental principle of the adversary system that neither side may knowingly present false evidence to the court. Reasonable persons can differ over the extent to which withholding of information potentially helpful to the defense may be countenanced in an adversary system; there is no room for disagreement over whether the government may knowingly present false testimony. "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction" is "implicit in any concept of ordered liberty" (*Napue*, 360 U.S. at 269). As the Court explained in the seminal case dealing with the knowing use of perjured testimony (*Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935)):

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error or the knowing use of perjured testimony but not for cases in which the government has simply failed to comply fully with a specific defense request for information.

> [D]ue process * * * cannot be deemed to be satisfied * * * if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

It is for this reason that the result of a trial in which the government knowingly used perjured testimony will not be allowed to stand unless the government can show, beyond a reasonable doubt, that the perjury was immaterial. As the Court stated in *Agurs*, "[i]n th[e]se cases, the Court has applied a strict standard of materiality * * * mo[st] importantly because they involve a corruption of the truth-seeking function of the trial process." 427 U.S. at 104. Such a strict standard serves several important interests. It maintains public confidence in " '[t]he untainted administration of justice' " (*Mesarosh* v. *United States*, 352 U.S. 1, 14 (1956) (citation omitted)). " 'The administration of justice must not only be above reproach, it must be above the suspicion of reproach.' " *People* v. *Savvides*, 1 N.Y. 2d 554, 556, 136 N.E.2d 853, 854, 154 N.Y.S. 2d 885, 887 (1956), quoted in *Kyle* v. *United States*, 297 F.2d 507, 514 (2d Cir. 1961); see *Napue*, 360 U.S. at 269-170. As one commentator has stated:

> Perjury or the possibility of perjury strikes at the heart of the judicial system in its role as finder of truth. When the prosecutor involves himself in perjury he lends official sanction to

> the fraud. * * * The court must combat this threat to its own dignity and to the dignity of the criminal system or risk the possibility that the community will lose faith in the entire criminal process. Thus [a strict standard of materiality] provide[s] protection for the court and the legal system as well as for the defendant.

Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 138 (1964). The strict standard of materiality also helps deter prosecutors from using false testimony by making it clear that their tactics, if discovered, will not bring them any advantage.

This case does not raise concerns remotely comparable to those of the cases involving the knowing use of perjured testimony. The obligation to respond to a request for impeaching information cannot be said to be fundamental to the concept of ordered liberty. A trial process in which the government does not fully respond to such requests could not be characterized as a "pretense" or a "contrivance." Nor can it possibly be said that public confidence in the criminal process depends on the belief that incomplete responses to such requests will not be countenanced in the way that it undoubtedly does depend on the perception that a "frame-up" of a defendant by the use of perjured testimony will not be tolerated. The application of a "beyond a reasonable doubt" standard to circumstances like those presented here would, therefore, be an unnecessary incursion on the finality of convictions obtained after a fair trial.

4. In sum, "specific request" cases warrant, at most, the application of a standard of materiality somewhat more generous to the defendant than the "reasonable probability" test of *Strickland* and the

third *Agurs* category, but well short of the "beyond a reasonable doubt" standard applied by the district court below. Abstractly speaking, the standard should be more strict than the "reasonable probability" standard to a degree precisely commensurate with the additional interests that are arguably implicated when the government fails to respond to a specific disclosure request; as we have noted, these interests are not very weighty.

In order to avoid the further proliferation of verbal formulations, however, the Court may wish to adopt for this purpose a well-recognized standard that falls between the "reasonable probability" and "beyond a reasonable doubt" standards—specifically, the test for harmless error applied to nonconstitutional cases. This standard was stated most fully in *Kotteakos*, 328 U.S. at 764-765:[23]

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand * * *. But if one cannot say, with fair assurance, after pondering all that happened * * * that the judgment was not substantially swayed by the error, it is impossible to conclude that [the error was harmless]. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether

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[23] The *Kotteakos* harmless error standard is, of course, distinct from the standard of harmless beyond a reasonable doubt that is applied in determining whether constitutional error requires that a conviction be set aside. See, *e.g.*, *Connecticut* v. *Johnson*, 460 U.S. 73, 88 n.2 (1983) (Stevens, J., concurring in the judgment); 3A C. Wright, *Federal Practice and Procedure* § 856 at 335 (1982).

> the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Needless to say, in applying this standard great deference should be given to the trial judge's determination, since he is in the best position by far to assess the impact that particular items of additional evidence would have had on the trial. See *Agurs*, 427 U.S. at 113-114. Moreover, it should ordinarily be difficult for a defendant to satisfy this standard when —as in this case—only evidence that tends to impeach a prosecution witness, and not directly exculpatory evidence, is at issue. Cf. *United States* v. *Anderson*, 574 F.2d 1347, 1354 (5th Cir. 1978).

The *Kotteakos* standard is applied after a finding of error for the purpose of determining whether the error was of sufficient gravity that it may have impaired the fairness of the trial. The situation for which the *Kotteakos* was designed is thus analytically distinct from the present class of cases, for nondisclosure of evidence that a defendant might have elected to introduce at trial is not in itself error—it is simply a possible reason to question the overall fairness of the trial. See pages 32-35, *supra*; *Agurs*, 427 U.S. at 111-112. Moreover, the *Kotteakos* standard is, in our view, more strict than is necessary to provide full protection to the rights of an accused in "specific request" cases, in view of the close resemblance between such cases and "general request" cases. But if the Court concludes that a reduced showing of materiality should be required for specific request cases, the *Kotteakos* standard is a familiar one, and it seems to us to reflect a reasonable if not ideal balance of interests. As this Court has recently noted, the purpose of harmless error rules like the

Kotteakos standard is to ensure "the essential fairness of the trial." *McDonough Power Equipment, Inc.* v. *Greenwood*, No. 82-958 (Jan. 18, 1984), slip op. 5. Since, as we have explained, the ultimate question in assessing the significance of the government's failure to respond to a request for evidence is whether the trial was essentially fair, the *Kotteakos* standard embodies the kind of inquiry reasonably well suited to the task.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10151

RESPONDENT'S

BRIEF

Office - Supreme Court, U.S.
FILED
MAR 1 1985
ALEXANDER L. STEVAS
CLERK

No. 84-48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, *Petitioner*,

v.

HUGHES ANDERSON BAGLEY, *Respondent*.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

Whether the government's non-disclosure of material, impeaching information concerning the bias of two key witnesses, and subsequent misleading response to respondent's specific pretrial discovery request violated respondent's constitutional right to a fair trial as secured through his Sixth Amendment right to assistance of counsel and effective cross-examination?

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I

RELEVANT CONSTITUTIONAL PROVISIONS

Amendment Five to the United States Constitution:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

Amendment Six to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him, and to have the assistance of counsel for his defense.

II

STATEMENT OF THE CASE

A federal grand jury indicted respondent Hughes Anderson Bagley in the Western District of Washington, alleging fifteen violations of federal firearms and narcotics statutes.[1] Respondent's trial counsel filed a detailed pre-trial discovery motion (J.A. 17-19), requesting, among other things,

> The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, any deals, promises or inducements made to witnesses in exchange for their testimony.

In partial response to the discovery request the government provided affidavits (E.R. 64-85), by two government

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[1] The charges are accurately recounted in Petitioner's Brief at p.2, n.1.

witnesses, O'Connor and Mitchell.[2] The affidavits were a response to respondent's specific request for evidence of any "deals, promises or inducements made to witnesses in exchange for their testimony." Each affidavit, after recounting the dealings the two witnesses had with respondent on various occasions, closes with the statement: "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." E.R. 65, 66, 70, 72, 74, 77, 79, 82, 84.[3]

Respondent waived jury,[4] was convicted on 11 counts of narcotics violations in December, 1977, and was acquitted on the remaining charges.[5]

While in custody serving his sentence, respondent filed requests for information pursuant to the Freedom of

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[2] We agree with the government's characterization of O'Connor and Mitchell at p.2 of Petitioner's Brief.

[3] The Petitioner claims that the court of appeals' characterization of these recitals, as statements that O'Connor and Mitchell "has neither received nor expected compensation for his services," is both exaggerated and inaccurate. Petitioner's Brief at p.3. n.4. The petitioner believes the statements "represent only that the witnesses were not paid for giving their statements. . . ." Id. The petitioner is attempting to minimize the impact of the statements upon the respondent and his trial counsel. When viewed in context, with respondent and trial counsel believing in good faith that the government had made full disclosure in response to their discovery request, the statements are materially false representations which mislead respondent and defense counsel.

[4] Respondent has filed a motion under 28 U.S.C. § 2255 alleging the government's failure to disclose the existence of the contracts caused him to waive his right to trial by jury when he would not have done so if he had known that the contracts existed.

[5] See Petitioner's Brief at p.2, n.2 for specifics regarding the convictions and acquittals.

Information Act and the Privacy Act, 5 U.S.C. §§ 552 and 552(a).[6] In response to his requests, respondent received edited copies of what appeared to be contracts signed by O'Connor and Mitchell in May, 1977, seven months prior to trial, promising the two payment for providing information about respondent to the Bureau of Alcohol Tobacco and Firearms (BATF), for acting as agents for BATF, for purchasing evidence for BATF, and for testifying against respondent. (J.A. 22-23). Based on the existence of these contracts and what respondent believed to be clear violations of his discovery request, respondent filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255.[7]The motion was assigned to the same district judge who had heard respondent's trial and convicted respondent.

Following a hearing conducted before a magistrate, the district court made several findings in denying respondent's motion. (Pet. App. 7A). The district court found that on or about May 3, 1977 O'Connor and Mitchell each signed a blank contract form entitled "Contract for Purchase of Information and Payment of Lump Sum Therefore". (J.A. 22-23) The printed language on each form "provided that the individual signing it would provide information to ATF; and that, "upon the accomplishment of the objective sought to be obtained by the use of such information," the United States will pay, "a sum commensurate with services and information rendered. . . ." Pet. App. 11A-12A. BATF agent Norm Prins,[8] the govern-

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[6] See Petitioner's App. 2A.

[7] See Petitioner's Brief at p.4, n.5 for the specifics regarding respondent's motion.

[8] Agent Prins presented the contracts to O'Connor and Mitchell for their signatures in May, 1977. At that time he had been a BATF agent for approximately five years. Although Assistant United States Attorney Francis J. Diskin was not aware of the existence of the contracts, Prins undoubtedly was aware of their existence and their relevance to the defense case.

ment's case agent and the person responsible for supervising O'Connor and Mitchell, "might have told them that he would attempt to secure some expense money for them." Id. at 12A. O'Connor and Mitchell received some expense money prior to trial. (Pet. Brief at p.5, n.7). After trial, Agent Prins arranged for O'Connor and Mitchell to receive $300 each pursuant to the terms of the contract. (Pet. App. at 13A-14A). (J.A. at 24-25). The district court then concluded that "it appears probable . . . that O'Connor and Mitchell did expect to receive from the United States some kind of compensation, over and above their expenses, for their assistance, though perhaps not for their testimony." Pet. App. at 7A.

The contracts signed by O'Connor and Mitchell in May, 1977, were not disclosed to respondent prior to trial. Assistant United States Attorney Francis J. Diskin, responsible for prosecuting respondent, stated in stipulated testimony that he had not known that the contracts existed and that he would have furnished them to respondent had he known of them. (Pet. App. at 13A).

The district court denied respondent's 2255 motion stating that because the court had been the trier of fact, it was able to determine what effect the contracts would have had upon the court's decision to convict respondent. (Pet. App. at 8A). The court ruled that beyond a reasonable doubt the contracts would have had no effect upon the convictions, (ibid.) explaining its ruling as follows:

> The Court has read in their entirety the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial . . . . Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The Court found the defendant not guilty of those charges. With respect the charges against the defendant of distributing controlled substances and possessing controlled substances with the intention of distributing them, the testimony of O'Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies which had been prescribed for defendant's own use. As to that aspect of their testimony, the testimony of O'Connor and Mitchell tended to be favorable to the defendant.[9]

The Ninth Circuit Court of Appeals reversed the district court's order (Pet. App. 1A-6A), stating that "the government's failure to provide [the] requested . . . information to [respondent] so that he could effectively cross-examine two important government witnesses requires an automatic reversal." Pet. App. at 5A-6A. The court stated that "the government's failure [alone] to produce requested *Brady* [v. Maryland] information is a serious due process violation," id. at 4A, that is "seldom, if ever, excusable." Ibid. The court then justified the automatic reversal stating that "failure to disclose requested *Brady* information that the defendant is even more egregious because it threatens the defendant's right to confront

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[9] The district court's rationale is flawed. Although the testimony of O'Connor and Mitchell may have been brief, it certainly was not favorable to respondent as it was the only testimony presented that was relevant to the drug charges on which the respondent was convicted. The court's statement that respondent did not attempt to discredit the two witness' testimony as to the facts of distribution is noteworthy. The government not only withheld evidence that could be used to discredit the testimony, but also submitted false statements which led respondent to believe that the testimony could not be discredited. Respondent had no reason to believe the testimony could be discredited.

adverse witness, and therefore, his right to a fair trial." Id. at 5A.

III

SUMMARY OF ARGUMENT

The court of appeals correctly found that the government's failure to disclose requested information concerning the paid status of its key and only witnesses against the defendant constituted material, constitutional error requiring reversal of his convictions. The peculiar facts of this case amply support the conclusions of the court of appeals. This Court formulated the basic principle that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution". *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). Nondisclosure in such situations is "seldom, if ever, excusable". *United States* v. *Agurs*, 427 U.S. 97, 106 (1976). These failures are seldom excusable because they almost invariably implicate the defendant's right to a fair trial as protected by the Fifth and Sixth Amendments. *Giglio* v. *United States*, 405 U.S. 150, 154-55 (1972); *Napue* v. *Illinois*, 360 U.S. 264 (1959). Where the government's failure to comply with its duty to disclose interferes with and materially affects a constitutional right of the defendant, reversal of a conviction is mandated. *Giglio* v. *United States*, *supra*; *Strickland* v. *Washington*, 466 U.S. ___, No. 82-1554 (May 14, 1984); *Davis* v. *Alaska*, 415 U.S. 308 (1974).

Applying the above principles to this case, the court of appeals held that the government's failure to disclose requested information resulted in a denial of respondent's right to effectively cross-examine the only witness

against him concerning their motive to provide false information based upon their status as paid informers. Such interference with the right to cross-examine critical government witnesses is "error of the first magnitude and no amount of showing of want of prejudice would cure it". *Davis*, 415 U.S. at 318, citing *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1966); *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968).

Despite the government's attempt to minimize the constitutional implications of its failing in this case, the court of appeals correctly found that constitutional error occurred and that the error required reversal. *Chapman* v. *California*, 386 U.S. 18, 23 (1967); *Giglio* v. *United States*, *supra*; *Napue* v. *Illinois*, *supra*. Rather than analyzing the record, the government here relies upon the dicta of the court of appeals, indicating that this case requires "automatic reversal," to justify its argument that there was no consideration given to the materiality of the government's misconduct in reaching the decision to reverse the defendant's convictions. As will be demonstrated below, the government's argument rests on a false premise. For this reason, the considerable effort spent by the government in its Opening Brief in an attempt to cast this case in non-constitutional terms is largely irrelevant.

IV

ARGUMENT

A. The Duty To Disclose

Both the district court and the court of appeals recognized that the government in this case failed to discharge its duty to disclose to the defendant, after request, information to which he had a right to discover. The government bears an institutional responsibility to provide to the defendant requested information which is exculpatory

in nature. *Brady* v. *Maryland*, 373 U.S. 83 (1963). Similarly, the government is obliged to disclose any and all consideration which it has held out to a witness or which the witness subjectively hopes for or anticipates since such consideration directly gives rise to the inference of bias or interest. *See generally, United States* v. *Mayer*, 556 F.2d 245, 248-49 (5th Cir. 1977) (cross-examination of a prosecution witness who has had prior dealings with the prosecution or other law enforcement officials "ought to be given the largest possible scope"; conviction reversed). More specifically, the prosecution is obliged to disclose sources of bias, motive or interest, such as potential financial reward or remuneration. *Wheeler* v. *United States*, 351 F.2d 946 (1st Cir. 1965); *United States* v. *McCrane*, 547 F.2d 204 (3rd Cir. 1976). This duty of disclosure was analyzed by this Court in *Giglio* v. *United States*, 405 U.S. 150 (1972). In *Giglio*, a key government witness testified that he was promised no consideration from the government in return for his testimony. In fact, a prosecuting attorney who was not responsible for the trial told the witness that, in return for his testimony, he would not be prosecuted. This communication was apparently unknown to the government's trial attorney. The Court reasoned:

> In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the non-disclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.

405 U.S. at 154.

The Court recognized that the witness, Taliento, provided key information for the government. Taliento's

credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know it. 405 U.S. at 154-55. Applying the test set down in *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959) the Court required a new trial because there existed a reasonable likelihood that the jury's verdict could have been affected.

The basic principle drawn from these cases is that the government is obliged to disclose pertinent, material evidence favorable to the defense, and this applies not only to matters of substance, but to matters relating to the credibility of government witnesses. *Giglio* v. *United States*, *supra; United States* v. *Gerard*, 491 F.2d 1300 (9th Cir. 1974).

B. Applicable Standard For Review

As a predicate to further discussion it is necessary to establish the standard for review of this case and to determine whether the court of appeals properly applied that standard. In *United States* v. *Agurs*, 427 U.S. 97 (1976), the Court established a framework for reviewing all cases involving non-disclosure of exculpatory or impeaching evidence by the prosecutor. *Agurs* distinguished three different situations involving "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense". 427 U.S. at 103. In each category a reviewing court is required to determine whether the undisclosed evidence was material. Each category contains its own criteria for determining when evidence is material and when it has reached a prescribed threshhold of significance requiring remand for a new trial. The threshhold differs for each situation.

The first category involves situations where a constitutional error has been committed. (See Petitioner's Brief at p.32). In this type of case materiality is present if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, at p.103. The second category involves situations where the defendant has made a pretrial request for specific, non-privileged evidence in the prosecutor's possession. If the prosecutor fails to produce such evidence, a subsequent conviction will be set aside if "the suppressed evidence might have effected the outcome of the trial," 427 U.S. at 104. Non-disclosure in this situation is "seldom, if ever, excusable", 427 U.S. at 106. Third, when defense counsel makes either a general request for exculpatory evidence or no request at all, any duty to disclose must derive from the obviously exculpatory character of evidence in the prosecutor's possession. A conviction will be set aside for non-disclosure only if the omitted evidence, evaluated in the context of the entire record, "creates a reasonable doubt that did not otherwise exist. . . ." 427 U.S. at 112.

Both the district court and the court of appeals categorized this case within the first level discussed above; that is, a non-disclosure involving constitutional error. We submit that this was the appropriate categorization. In *Agurs*, this Court identified the knowing and uncorrected use of perjured testimony as the type of case which would result in constitutional error if there was any reasonable likelihood that the false testimony could have affected the judgment of the jury. The Court relied upon its prior decisions in *Giglio* v. *United States*, *supra; Alcorta* v. *Texas*, 355 U.S. 28, 31 (1957) and *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (per curiam). In cases fitting within the first category defined by *Agurs*, the test applied is the harmless constitutional error test set forth in *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

The uncorrected use of perjured testimony is a particularly egregious form of non-disclosure. A new trial in such situations will follow almost universally. This is so "not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." *United States* v. *Agurs*, 427 U.S. at 104. Materiality inheres in such situations. Indeed, it is difficult to imagine a situation involving the use of undisclosed and perjured testimony which would not result in reversal. However, the use of perjured testimony is not the only type of case involving the first category of non-disclosure discussed in *Agurs*. We submit, and the government apparently agrees (Pet. Brief at p.32) that non-disclosures resulting in constitutional error must all be analyzed under the harmless constitutional error standard. It is precisely this principle which resulted in the court of appeals decision in this case:

> Standing alone, the government's failure to produce requested *Brady* information is a serious due process violation. *Hibler*, 463 F.2d at 459. In fact, this failure is 'seldom, if ever, excusable.' *United States* v. *Agurs*, (citation omitted). But a failure to disclose requested *Brady* information that the defendant could use to conduct an effective cross-examination is even more egregious because it threatens the defendant's right to confront adverse witnesses, and therefore, his right to a fair trial. (citation omitted)

719 F.2d at 1464

The court of appeals rested this conclusion on this Court's decision in *Davis* v. *Alaska*, 415 U.S. 308 (1974). *Davis* involved inappropriate restrictions on the defendant's right to cross-examine a critical witness testifying against him. The trial court refused to allow defense counsel to cross-examine the witness concerning his sta-

tus as a juvenile probationer. The Court found that the limitations imposed by the trial court impermissibly interfered with the defendant's Sixth Amendment right to confront his accusers. It is precisely that right which was jeopardized in this case. In *United States* v. *Agurs*, *supra*, the Court reasoned that "if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U.S. at 110. Thus, when analyzing the materiality of errors occurring through the non-disclosure of relevant evidence to a defendant, the courts are directed to focus on the nature of the evidence withheld in relation to the specific constitutional right offended. The following discussion focuses on the character of the evidence withheld and its effect upon specific constitutional rights of the respondent.

C. The Nature Of The Constitutional Error In This Case

1. The Sixth Amendment Guarantees The Right To The Effective Assistance Of Counsel

A review of this Court's decisions demonstrates the firmly established principle that the Sixth Amendment right to counsel "is a fundamental component of our crimi nal justice system." *United States* v. *Cronic*, 466 U.S. ___, No. 82-660 (May 14, 1984).[10] The right to counsel is one that forms the bulwark for the invocation of all other rights:

> Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail' as this Court has recognized repeatedly. 'Of the rights that an accused person has, the right to be represented by counsel is by far the most precious, for it affects his ability to assert any other right he may have.'

Id. (footnotes omitted).

Nearly fifty years ago this Court recognized a defendant's need for the assistance of counsel in *Powell* v. *Alabama*, 287 U.S. 44 (1938).[11] More recently, this Court found that defense counsel is just as much a necessity as a prosecutor is in criminal proceedings. *Gideon* v. *Wainright*, 372 U.S. 335 (1963). The question that follows concerns the level of "Assistance" that is required by defense counsel.

> 'It has long been recognized that the right to counsel is the right to the effective assistance of counsel.' *McMann* v. *Richardson*, 397 U.S. 759, 771, n.4 (1970). The text of the Sixth Amendment itself suggests as much. The amendment requires not merely the provision of counsel to the accused, but 'Assistance,' which is to be 'for his defence.' Thus, 'the core purpose of the counsel guarantees was to assure 'Assistance' at trial, when the accused was confronted with both the intracacies of the law and the advocacy of the prosecutor.' *United States* v. *Ash*, 413 U.S. 300, 309 (1973).

United States v. *Cronic*, 466 U.S. at ___.

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[10] See also, *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *In Rae Gault*, 387 U.S. 1, (1976); *Douglas* v. *California*, 372 U.S. 353 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Powell* v. *Alabama*, 287 U.S. 45 (1932).

[11] In *Powell*, the Court found that the nine Scottsboro boys, charged with capital rape, had been denied a fair trial in violation of the Due Process Clause, based on counsel's performance at trial. Respondent's right to a fair trial under the Due Process Clause is discussed in Section C3, infra.

The Sixth Amendment, then, guarantees not only the "Assistance" of counsel, but also the "effective assistance of counsel."

2. The Right To The Effective Assistance Of Counsel Is Inextricably Intertwined With The Right To Confront The Witnesses Against The Respondent And The Right To Cross-Examine Those Witnesses With The Assistance Of Counsel

The Sixth Amendment right guaranteeing an accused "to be confronted with the witnesses against him" means more than simple physical confrontation. *Davis* v. *Alaska*, 415 U.S. at 315. There the Court quoted *Douglas* v. *Alabama*, 380 U.S. 415, 418: "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." The Court went on to quote Professor Wigmore's Treatise on Evidence,[12] finding that:

> Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harrassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing,

[12] "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions in obtaining immediate answers. 5 J. Wigmore Evidence, § 1395, p.123 (3rd Ed. 1940)."

> the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trail, and is 'always relevant as discrediting the witness and effecting the weight of his testimony.' 3A J. Wigmore, Evidence § 940, p.775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Greene* v. *McElroy*, 360 U.S. 474, 496 (1959).

Davis v. *Alaska*, 415 U.S. at 316-17.

Cross-examination is a means by which a seasoned trail lawyer can attack what would otherwise appear to be an air-tight case. "Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and argument would have stood up against rebuttal and cross-examination by a shrewd, well prepared lawyer." *Strickland* v. *Washington*, 466 U.S. at ____. (Marshall, J., dissenting).

A defendant's right to confront his accusers and to cross-examine them cannot be separated from the right to the effective assistance of counsel. Denial of any of these rights erodes the public's confidence in the criminal justice system and deprives a defendant of his right to a fair trial.

3. The Fifth Amendment Right To Due Process Guarantees The Right To A Fair Trial

This Court has found

> [t]hat the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trail. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment. . . .

Strickland v. *Washington*, 466 U.S. at ____.

A fair trial is "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Id.[13] This adversarial process works properly only when both sides have equal access to the tools needed to establish the facts and, ultimately, the truth. Without equal access to the tools, the adversary system stumbles, undermining the integrity of the truth finding process and the reliability of the verdict.

4. The Government's Failure To Disclose The Contracts Signed By O'Connor And Mitchell Denied Respondent The Right To A Fair Trial, The Right To Confront His Accusers, And The Right To The Effective Assistance Of Counsel

The government had in its possession contracts signed by O'Connor and Mitchell approximately seven months prior to trial. On its face, each contract gave O'Connor and Mitchell at the very least, the expectation of receiving payment or reward for services rendered. The fact that

[13] The adversarial process has been emphasized by this Court repeatedly in recent years. See footnote 10, *supra*, and cases cited therein.

the contracts, when signed, did not promise a specific amount to each witness does not render the contracts impotent. Rather, it makes the respondent's need to cross-examine O'Connor and Mitchell regarding the contracts that much greater, for the witnesses had the incentive to perform beyond expectation in order to maximize their profits. The reality of this human flaw was recognized in *Boone* v. *Paderick*, 541 F.2d 447, 451 (4th Cir. 1976). There the court reasoned that "the more uncertain the agreement the greater the incentive to make the testimony pleasing to the promisor." See also, *Campbell* v. *Reed*, 594 F.2d 4, 7-8 (4th Cir. 1979). Therefore, it is all the more important to allow full cross-examination in such cases to explore both the motives for falsification and the possible impact of future expectations upon the quality of the testimony being offered.

The government would lead the court to believe that because the prosecutor was not aware that the contracts existed, the government should not suffer adverse consequences due to the nondisclosure.

> Nor is the effect of non-disclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officers other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. 'The cruelest lies are often told in silence.' If the

> police silence as to the existence of the reports resulted from negligence rather than guile, the deception is no less damaging.

Barbee v. *Warden*, 331 F.2d 842, 846 (4th Cir. 1964) (footnotes omitted).

The government must accept full responsibility for the failure to disclose the contracts, especially in light of respondent's specific discovery request for such evidence.

This failure was magnified by the government's disclosure, immediately prior to trial, of statements by O'Connor and Mitchell[14] indicating that they had not been paid, would not be paid, and did not expect to be paid for their undercover work. These statements effectively coaxed respondent and trial counsel into believing that the testimony of O'Connor and Mitchell was not subject to attack.[15]

The withholding, whether deliberate or negligent, prevented trial counsel from confronting O'Connor and Mitchell with evidence of their motive to testify and from thoroughly cross-examining them regarding the contracts. Without the contracts in hand to prepare for cross-examination of the witness, trial counsel's representation was, through no fault of his own, less than effective. For example, we can assume that the decision to waive the right to a jury trial was impacted by the government's false representation that it possessed no impeaching

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[14] The Court should note that some of these statements were signed by O'Connor and Mitchell on the same day as that on which the contracts were signed.

[15] The obvious attack on credibility would focus on the witness' motive to please the government by maximizing the effect of their assistance, i.e., by assuring a conviction, in expectation of maximizing their profits. See *Campbell* v. *Reed*, 594 F.2d 4, 7-8 (4th Cir. 1979).

information concerning O'Connor and Mitchell. Respondent's Sixth Amendment rights were violated, due soley to governmental interference.[16]

The adversarial process broke down due to the governmental interference. The district court was not presented with material evidence and argument by counsel as to the effect of the evidence, depriving respondent of a fair trial.

> [T]his Court and other courts have been . . . nearly unanimous in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witness against him is a denial of the . . . guarantee of due process of law.

Pointer v. *Texas*, 380 U.S. 400, 405 (1965).

The adversarial process having broken down in this case, "the process loses its character as a confrontation between adversaries, [and] the constitutional guarantee is violated. *United States* v. *Cronic*, 466 U.S. at ____.

The above discussion clearly indicates that substantial constitutional rights of the respondent were violated as a result of the non-disclosures in this case. The following discussion focuses on the "character of the evidence" withheld. The critical importance of the withheld evidence

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[16] "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." "*Strickland* v. *Washington*, 466 U.S. at ____. Here the government interfered by affecting respondent's right to trial by jury, right to confront his accusers, right to cross-examination, right to the effective assistance of counsel, and right to a trial comporting with the due process of the law.

demonstrates that the court of appeals was correct in finding that the government's nonfeasance required reversal.

D. The Materiality Of The Non-Disclosure

As the above argument indicates, the non-disclosures interfered with the defendant's constitutional right to a fair trial as secured by the Fifth Amendment and Sixth Amendment right to effectively confront his accusers. Because this case involves federal constitutional error, it cannot be held to be harmless unless this Court is able to declare that there exists no reasonable likelihood that the error affected the outcome of the trial. *United States* v. *Agurs*, *supra*, at p.103. In light of the facts of this case, the court of appeals determined that a retrial was necessary. Retrial was ordered after review of the entire trial court record. The court stated that the magnitude of the error requires "an automatic reversal". *Bagley*, 719 F.2d at 1464. Within the context of the decision, the "automatic reversal" language is dicta. Yet, it is the "automatic reversal" language which forms basis for the petitioner's argument that the issue of materiality was not addressed by the court of appeals. However, a reading of the entire content of the opinion quite clearly indicates otherwise. In fact, the government concedes that the opinion "might be read to hold that respondent's convictions must be set aside only because the district court erred in concluding that the non-disclosure of the ATF form contracts was harmless beyond a reasonable doubt". Pet. Brief, at p.10, n.8. In the same note the government properly states that the court relied upon its prior decision in *United States* v. *Goldberg*, 582 F.2d 483 (9th Cir. 1978) in analyzing and deciding the issue at bar. In *Goldberg* the court of appeals found that:

> Since under the due process clause prosecutorial failure to respond to a specific request 'is seldom, if ever, excusable,' . . . such a non-disclosure is properly anaylzed as error; and it therefore follows that the reviewing judge should apply the harmless error standard, . . . [T]he *Chapman* standard of 'harmless beyond a reasonable doubt' requires a new trial whenever there is a 'reasonable possibility' that the error materially affected the verdict. (citations omitted). (footnote omitted).

582 F.2d at 488-89

The court then goes on to briefly discuss the facts in this case which it believed required reversal. In arguing that the court failed to consider materiality, the petitioner complains that "at the very least, if the court of appeals did intend to overturn the trial judge's determination on this issue, one would have expected the court of appeals to provide a more full explanation of why the trial judge erred". Pet. Brief at p.11, n.8. Appropriately, the petitioner cites no authority for the proposition that a court of appeals is required to provide a lengthy dissertation as to why an instance of prosecutorial misconduct requires reversal. There is no such requirement. The petitioner's real complaint is the superfluous use of the phrase "automatic reversal". While that phrase distracts the petitioner, it does not support its theory that the court failed to consider the issue of materiality at all.

In determining that this case involved material constitutional error, the court cited to *Davis* v. *Alaska*, *supra*. The teachings of *Davis* were appropriately relied upon by the appellate court. This case involved more than mere non-disclosure. The affidavits of the government witnesses contained the recital that "I made this statement freely and voluntarily without any threats or rewards or

promises of reward having been made to me in return for it". E.R. 65, 66, 70, 72, 74, 77, 79, 82, 84. This statement was provided in response to respondent's comprehensive pretrial discovery requests. (J.A. 17-19). The pretrial discovery motion included specific request under *Brady* v. *Maryland*, *supra*, (J.A. 18), *and* "information concerning any deals, promises or inducements made to witnesses in exchange for their testimony". (J.A. 18). The clear import of the request was receipt of information concerning any inducements, monetary or otherwise, made to the witness which might color testimony. The government quite obviously understood the import of the request. By providing affidavits from the witnesses stating that no rewards or promises of reward had been made, the government quite clearly evidenced its understanding that the request was for information concerning remuneration or consideration of any type which might tend to color the testimony of the witnesses. Notwithstanding this specific response to a specific request, the petitioner advances what can charitably be described as a disingenuous argument to the effect that the respondent's discovery request was a general request within the meaning of *United States* v. *Agurs*, *supra*. (Pet. Brief at p.20; p.9, n.14). This argument is troubling not because it has merit but because it has been advanced. The meaning of the request was quite clearly comprehended by the government *at the trial level*. At the trial level, both parties deal with the practicalities of preparation without parsing each sentence of a pleading in hope of finding a means to avoid a properly advanced request. That the petitioner would attempt to do so here undermines the credibility of its position.

Petitioner's argument that the request was not "specific" fails for yet another reason. Specific requests are favored in order to put the prosecution on notice as to

what information in its possession might be considered favorable by the defense in preparation for trial. The notice problem does not arise in cases involving promises of consideration, remuneration, or favorable treatment. The prosecutor does not need to know the defendant's theory of the case to recognize the value of information concerning payments made or contemplated to a witness. He or she knows that the witness's testimony is important to the government's case otherwise promises of consideration would have been unnecessary. See, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 Harv. L. Rev. 887, 895-96 (1981). There could have been no doubt about the meaning of the request in this case. The response of the government to the discovery request is clear evidence of the same. As noted in *Agurs*, "the prudent prosecutor will resolve doubtful questions in favor of disclosure". 427 U.S. at 108.[17]

There can be no question but that the government understood its obligation of disclosure. The government did more than fail to disclose properly discoverable information concerning bias and motive for falsification. The government, at least negligently, mislead the defense by indicating that there were no promises of reward. As a result of that deception, the defense of the respondent

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[17] After speciously arguing that the request in this case was not specific, the petitioner spent considerable time arguing that "specific request" cases should be analyzed under the same standards set forth in the third category of cases outlined in *Agurs*. [Pet. Brief pp.25-31]. This argument was rejected by the court in *Agurs*, at pp.106-07, 111. While it is understandable that the petitioner would be delighted with a relaxation of standards for review of prosecutorial misconduct, its argument is unpersuasive and, we submit, should not result in reversal of the reasoning set forth in *Agurs*.

was materially impacted. The forceful opinion in *Davis* v. *Alaska*, *supra*, leaves no doubt as to the significance of cross-examining a key prosecution witness on the issue of bias or possible motive for falsification. In *Davis*, the defendant was unable to cross-examine concerning motive. Here, the defendant wholly abandoned any attempt to discredit the testimony of the government's key witnesses because of the representations by the government that there existed no evidence concerning remuneration or expectation of compensation. The trial court found "with respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show the controlled substances in question came from supplies which had been prescribed for defendant's own use." Pet. App. at 8A. The misrepresentations of the government resulted in no cross-examination of the only government witness as to bias or motivation for falsification. It is difficult to conceive of an example more closely aligned with the reasoning of *Davis*. Both cases involve limitations on the right to cross-examination. Both cases involve limitations on cross-examination directed toward revealing possible biases, prejudices or other ulterior motives. *Davis* involved a judicially imposed limitation. This case involves limitations occasioned by intentional or negligent misrepresentations of the government. The end result is the same. Both defendants were denied their constitutional right to full and effective cross-examination. In *Davis* this limitation was seen as fatal because the limited cross-examination went to the key prosecution witness. However, in *Davis* there was circumstantial evidence coroborative of the witness' testimony. In this case, the evidence adduced at trial relevant to the drug count for which respondent was convicted came *solely* from the

mouths of the witnesses who were protected from effective cross-examination through the government's misrepresentations.

It is often difficult to quantify the harm resulting from the prosecution's withholding relevant evidence. For this reason the courts are slow to speculate as to whether the withheld materials could have been used effectively at trial. *Goldberg* v. *United States*, 425 U.S. 94, 111 (1976). In *Clancy* v. *United States*, 365 U.S. 3212, 316 (1961) this Court found "since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively".

Rather than speculate as to what a jury may or may not have done, it is the responsibility of this Court to re-examine the evidentiary basis on which the lower court's conclusions are founded. *Niemoto* v. *Maryland*, 340 U.S. 268, 271 (1951). Re-examination of the full record allows this Court to take into consideration the peril noted by the petitioner in its brief concerning the impact of non-disclosure on a defense. Petitioner appropriately concedes that

> An incomplete response to a specific request not only deprives the defendant of certain evidence but has the effect of representing to the defendant that the evidence does not exist. The defendant may, as a result, abandon certain defenses or certain lines of inquiry that he would otherwise have pursued. It may then be difficult for a defendant, in post-trial proceedings, to reconstruct the course that his defense in the trial would have taken and to demonstrate that he would have created a reasonable doubt about his guilt. This can happen even if, as in this case, the incomplete response is given in complete

> good faith and without any intention of misleading the defense."

Pet. Brief at p.31.

The peril outlined by the prosecution is precisely what occurred in this case. The defense was led to believe that there existed no evidence concerning the possibility of bias on the part of the governments two key witnesses. Accordingly, effective cross-examination was not only limited, it was abandoned. The result was conviction. That the district court characterizes the witnesses testimony as "exculpatory" is contradicted by its verdict. The unobstructed testimony of the witnesses resulted in the conviction of respondent. This logic was correctly advanced by the court of appeals. Based upon the government's non-disclosure of properly discoverable impeachment materials, the court found that respondent's right to a fair trial and to effective cross-examination were materially and negatively impacted. Accordingly, the convictions were properly reversed.

V

CONCLUSION

For the foregoing reasons we respectfully submit that the court of appeals correctly found that the government's nonfeasance in this case materially interfered with respondent's constitutional right to a fair trial. The resulting reversal of respondent's convictions was the proper result. Therefore, we request that the decision of the court of appeals be affirmed.

Respectfully submitted,

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REPLY

BRIEF

(5)

No. 84-48

Office-Supreme Court, U.S.
FILED
MAR 11 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The court of appeals' explicit holding was that "the government's failure to provide requested *Brady* information to [respondent] so that he could effectively cross-examine two important government witnesses requires an automatic reversal" (Pet. App. 5a-6a). In our opening brief, we demonstrated that the court of appeals' "automatic reversal" approach — under which the court required no showing of the materiality of the undisclosed evidence — is utterly inconsistent with this Court's decisions. U.S. Br. 10-17. We further urged that the standard of materiality used for determining whether a conviction must be set aside because the government did not make a complete response to a specific defense request for information should be less strict than the "beyond a reasonable doubt" standard that the district court found to be satisfied here. U.S. Br. 18-41.

Respondent makes no serious effort to defend the court of appeals' "automatic reversal" rule; instead, he asserts that the court of appeals' use of that phase was "superfluous" (Resp. Br. 21).[1] But respondent also fails to show that the ATF form contracts that the government failed to disclose were in fact material to this prosecution. Respondent simply asserts in general terms that the government's failure to deliver the form contracts to the defense materially affected the defense case (see, *e.g.*, Resp. Br. 19-20, 24-26); like the court of appeals, respondent identifies nothing in the record that suggests that disclosure of the form contracts would have significantly impeached the testimony of O'Connor or Mitchell, and, again like the court of appeals, respondent provides no justification whatever for disturbing the ruling of the district court judge, who stated that he would have found respondent guilty even if he had known of the form contracts.[2]

Instead, respondent's principal tactic appears to be to assert that the government affirmatively misled his trial counsel by making false representations. In this connection, respondent repeatedly refers (see Resp. Br. 2 & n.3, 5 n.9, 18-19, 22, 24) to affidavits, executed by O'Connor and Mitchell during the investigation of respondent, that detailed the affiants' dealings with respondent;[3] these affidavits were

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[1]Our citations to respondent's brief refer to the typescript; the printed copy was unavailable when we filed this reply.

[2]Respondent's assertion (Br. 5 n.9) that the testimony of O'Connor and Mitchell was the sole basis of his convictions is incorrect; the evidence that formed the basis of nine of the eleven counts on which respondent was convicted was uncovered during a search of respondent's residence. See VI Tr. 1039 (government counsel stated, without defense objection, stipulation that controlled substances were uncovered in a search of respondent's residence); *id.* at 1107-1108.

[3]The affidavits appear at E.R. 64-85 and are also appended to respondent's motion for collateral relief, a copy of which we lodged with the Clerk of this Court when we filed our opening brief.

delivered to respondent before trial in response to his discovery requests.[4] Each affidavit concluded with a paragraph similar to the following:

> I have read the foregoing statement consisting of 4 pages, each of which I have signed. I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief. * * * I made this statement freely and voluntarily without any threats or rewards, or promises of rewards having been made to me in return for it.

E.R. 65; see E.R. 66, 70, 72, 74, 77, 79, 82. 84. Respondent describes these statements as "materially false representations" (Br. 2 n.3), "false statements which led respondent to believe that the [trial] testimony [of O'Connor and Mitchell] could not be discredited" (Br. 5 n.9), and "misrepresentations" that "indicate[ed] that there were no promises of reward" (Br. 24).

We showed in our opening brief that these statements in the affidavits were not false at all. U.S. Br. 3 n.4. Moreover, while the court of appeals incorrectly characterized these statements (Pet App. 2a), it did not assert that they were false, and it appears to have attached no significance to them; it based its "automatic reversal" squarely on the nondisclosure of the ATF form contracts, not on any suggestion that the government misled respondent.[5] Indeed, it

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[4]Respondent asserts (Br. 2, 22-23) that the affidavits were delivered in response to the discovery request that was the basis of the court of appeals' ruling, a request for "any deals, promises, or inducements made" to government witness "in exchange for their testimony" (J.A. 18; see Pet. App. 2a). But the affidavits make no reference to trial testimony, and it is evident that they were in fact delivered in response to respondent's request for "all Jencks Act material" (J.A. 18).

[5]See, *e.g.*, Pet. App. 1a (asserting that this case concerns the "nondisclosure of impeachment evidence"); *id.* at 2a-3a ("the prosecutor's failure to produce information material to the credibility of key

is not apparent from the record that the affidavits were even introduced into evidence at the trial. But because respondent has attached such significance to these affidavits — emphasizing them far more heavily than the ATF form contracts that were the basis of the court of appeals' decision — we consider it appropriate to review the facts that demonstrate that the affidavits were not inaccurate or misleading in any way.

The boilerplate language in the affidavits represented that O'Connor and Mitchell had not received or been promised rewards for executing the affidavits. There is no finding, and no evidence, that either O'Connor or Mitchell ever received or was promised a reward in connection with the affidavits. Well after the trial — and therefore long after the dates on which they executed the affidavits — O'Connor and Mitchell were compensated for their services in connection with the investigation of respondent. But the fact that a law enforcement officer has received legitimate compensation for helping to conduct an investigation does not mean that a statement he made about his role in the investigation was given "in return for" a "reward." Moreover, the district court found that O'Connor and Mitchell received no promises of compensation (see Pet. App. 7a, 11a-12a); therefore, O'Connor and Mitchell had not received *any* "rewards, or promises of rewards" for *any* purpose at the time they executed the affidavits. The district court remarked that O'Connor and Mitchell may have entertained a subjective

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government witnesses"); *id.* at 3a (referring to the government's duty "upon specific request * * * to disclose information favorable to the accused"); *id.* at 4a ("The government's failure to disclose this *Brady* information inhibited [respondent's] ability effectively to cross-examine two important prosecution witnesses."); *id.* at 5a ("the government's failure to provide requested *Brady* information").

expectation that they would be compensated for their services (*id.* at 7a), but nothing in the affidavits is remotely inconsistent with their having had such a purely subjective expectation of compensation for this purpose.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1985